Supreme Court, U.S.

No. 93-548

In The

# Supreme Court of the United States

October Term, 1993

WILLIAM CODY KELLY, Trustee,

*Petitioner,*

vs.

THE STATE OF CALIFORNIA,
THE STATE OF NEVADA,
TAHOE REGIONAL PLANNING AGENCY,

*Respondents.*

**Petition For Writ Of Certiorari**
**To The Supreme Court Of The State Of Nevada**

## BRIEF IN OPPOSITION OF RESPONDENT TAHOE REGIONAL PLANNING AGENCY

GARY A. OWEN
CROWELL, SUSICH, OWEN & TACKES
510 West Fourth Street
P.O. Box 1000
Carson City, Nevada 89702
(702) 882-1311

*Counsel of Record*
*for Respondent*
*Tahoe Regional Planning Agency*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

## QUESTIONS PRESENTED

1. Should this Court grant certiorari to consider a Fifth Amendment takings decision, reached after nearly five weeks of trial and unanimously affirmed by the Nevada Supreme Court, emanating from the unique regulations of the Tahoe Regional Planning Agency governing environmental protection in the complex ecosystem of the Lake Tahoe Basin, where those regulations, as applied to six hilltop lots owned by Petitioner William Cody Kelly, permit residential use as reflected by the lots' conceded, undiminished market value of between $2,000,000 and $4,000,000?

2. Did William Cody Kelly suffer denial of economically viable use of those lots, where they originally were part of an undivided, 44-acre parcel acquired by him for $500,000 and upon which rested the Fleischmann Mansion, the object of his desire for the land, where Kelly lived in the mansion 18 years, later selling it for $1,100,000, and divided the remainder of the parcel into 39 executive, residential lots, sales of which, *excluding* those at issue but including the mansion, have produced approximately $5,600,000?

3. Should this Court grant certiorari to review a ruling by the Nevada trial court, affirmed without comment by the Nevada Supreme Court, that the Tahoe Regional Planning Compact preempts Article 1, Section 8, of the Nevada Constitution, the takings proscription, where Kelly failed before the Nevada Supreme Court – as he fails before this Court – to demonstrate how this case would have been decided differently under the Nevada

## QUESTIONS PRESENTED – Continued

Constitution, as opposed to the Fifth Amendment to the United States Constitution, and where decisions of the Nevada Supreme Court regularly intermix discussions of the state and federal Takings Clauses?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... vi

TABLE OF ABBREVIATIONS ..... x

**I. STATEMENT OF THE CASE** ..... 2

A. NATURE OF THE CASE ..... 2

B. THE LAKE TAHOE BASIN ..... 3

C. KELLY'S ACQUISITION OF THE 44-ACRE PARCEL ..... 5

D. THE 1969 TAHOE REGIONAL PLANNING COMPACT ..... 6

E. THE CREATION OF UPPAWAY ESTATES ... 7

F. IMPLEMENTATION OF THE 1980, AMENDED TAHOE REGIONAL PLANNING COMPACT ..... 9

1. The 1980 Compact ..... 9

2. Ordinance 81-5 ..... 10

3. The 1984 Plan ..... 13

4. The 1987 Plan ..... 14

G. THE ECONOMIC IMPACT OF TRPA'S REGULATIONS ..... 17

**II. REASONS FOR DENYING THE PETITION** ... 18

A. SUMMARY ..... 18

TABLE OF CONTENTS – Continued

Page

B. THE ISSUES HERE – ASSUMING THEY CLEARLY EMERGE AT ALL – ARE NOT NATIONALLY IMPORTANT QUESTIONS OF FEDERAL LAW ..... 19

C. THE NEVADA SUPREME COURT PROPERLY CONDUCTED THE AD HOC, FACTUAL INQUIRY: THE EVIDENCE DEMONSTRATED THE HILLTOP LOTS WERE ALLOWED BENEFICIAL, RESIDENTIAL USE AND MAINTAINED HIGH MARKET VALUES REFLECTING IT. KELLY'S REASONABLE, INVESTMENT-BACKED EXPECTATIONS ALSO WERE SATISFIED.. 20

1. The Ad Hoc, Factual Inquiry ..... 20

2. Kelly Has Suffered No Unconstitutional Economic Impact ..... 21

3. Kelly's Reasonable, Investment-Backed Expectations Have Been Satisfied ..... 22

4. Kelly's *Penn Central* Argument Need Not Be Reached, But In Any Event Does Not Fit This Case And Presents No Reason To Grant Certiorari ..... 24

a. The Nevada Supreme Court Employed Grounds Other Than "The *Penn Central* Quotation" To Decide This Case, Rendering It Unnecessary To Reach The Issue... 25

TABLE OF CONTENTS – Continued

Page

b. This Case Presents The Same "Factual Context" As Kelly Insists Is Necessary for A Correct Reading of *Penn Central* ..... 25

c. Kelly's Approach Is Designed To Circumvent Candid Analysis of His Reasonable, Investment-Backed Expectations ..... 27

D. KELLY'S PREEMPTION ARGUMENT IS BEREFT OF VITALITY: HE FAILS HERE – AS HE FAILED BELOW – TO SHOW HOW THE CASE WOULD HAVE BEEN DECIDED DIFFERENTLY UNDER THE NEVADA CONSTITUTION ..... 28

III. **CONCLUSION** ..... 30

## TABLE OF AUTHORITIES

Page

CASES:

*Agins v. Tiburon*, 447 U.S. 255 (1979) ..... 20

*Alper v. Clark County*, 93 Nev. 569, 571 P.2d 810 (1977) ..... 29

*Carr-Bricken v. First Interstate Bank*, 105 Nev. 570, 779 P.2d 967 (1989) ..... 28

*Ciampitti v. United States*, 22 Cl. Ct. 310 (1991) ..... 27

*City And County of San Francisco v. Golden Gate Heights Investment*, 14 Cal.App.4th 1203 (1993)..... 27

*Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986) ..... 24

*County of Clark v. Alper*, 100 Nev. 382, 685 P.2d 943 (1984) ..... 29

*Daines v. Markoff*, 92 Nev. 582, 555 P.2d 490 (1976) .... 29

*Deltona Corp. v. United States*, 657 F.2d 1184 (Fed. Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982) ..... 27

*Jentgen v. United States*, 657 F.2d 1210 (Ct. Cl. 1981) .... 27

*Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987) ..... 20

*Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886 (1992).....21, 22

*Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) ..... 27

TABLE OF AUTHORITIES – Continued

Page

*Pace Resources, Inc. v. Shrewsbury Tp.*, 808 F.2d 1023 (3d Cir. 1987), *cert. denied*, 482 U.S. 906 (1987), *reh'g denied*, 483 U.S. 1040 (1987) ..... 24

*Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) ..... 22, 24, 25, 26, 27

*People ex rel. Younger v. County of El Dorado*, 96 Cal. Rptr. 553, 487 P.2d 1193 (Cal. 1971) ..... 3

*People of California v. Tahoe Regional Plan Agency*, 766 F.2d 1308 (9th Cir. 1985) ..... 9, 13, 14

*People of California v. Tahoe Regional Planning Agency*, No. CIV-S-84-0561-EJG, United States District Court, Eastern District of California (1984) ..... 13

*People of St. of Cal. ex rel. Younger v. Tahoe Reg. P. Ag.*, 516 F.2d 215 (9th Cir. 1975), *cert. denied*, 423 U.S. 868 (1975) ..... 6

*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) ..... 24

*Sproul Homes v. State ex rel. Dep't Hwys.*, 96 Nev. 441, 611 P.2d 620 (1980) ..... 29

*Tacchino v. State ex rel. Dep't Hwys.*, 89 Nev. 150, 508 P.2d 1212 (1973) ..... 29

*Tahoe Regional Planning Agency v. Douglas County, et al.*, No. R-75-130 (D. Nev., Oct. 24, 1975) ..... 7

*Tahoe-Sierra Preservation v. Tahoe Reg. Planning*, 938 F.2d 153 (9th Cir. 1991) ..... 14

TABLE OF AUTHORITIES – Continued

Page

*Truckee-Carson Irr. Dist. v. Wyatt*, 84 Nev. 662, 448 P.2d 46 (1968), *cert. denied*, 395 U.S. 910 (1968) .... 28

*Yee v. City of Escondido, Cal.*, 503 U.S. ___, 112 S.Ct. 1522 (1992) .....20, 27

UNITED STATES CONSTITUTION

Fifth Amendment .....2, 29, 30

Fourteenth Amendment .....2

NEVADA CONSTITUTION

Article I, § 8 .....29

FEDERAL STATUTES

Federal Clean Water Act (33 U.S.C. § 1251 *et seq.*) .... 10

INTERSTATE COMPACTS

*Tahoe Regional Planning Compact*, Pub. L. 91-148, 83 Stat. 360 (1969); Cal. Gov. Code §§ 66800 & 66801; NRS 277.190 & 277.200 Article I(c) ..... 6

Article III(g) ..... 6

Article VI(k) ..... 7

*Tahoe Regional Planning Compact*, Pub. L. 96-551, 94 Stat. 3233 (1980); Cal. Gov. Code §§ 66800 & 66801; NRS 277.190 & 277.200 .....6, 9

Article I(a) ..... 9

Article II(i) ..... 9

TABLE OF AUTHORITIES – Continued

Page

Article V(b) ..... 9

Article V(c) ..... 9

Article VI(a) ..... 10

Article VI(b) ..... 10

TREATISES AND ARTICLES

3 K. Manaster and D. Selmi, *California Environmental Law and Land Use Practice*, § 64.04(6) (1990) ..... 6

*Land-Capability Classification of The Lake Tahoe Basin, California-Nevada: A Guide For Planning*, Robert G. Bailey (1974) ..... 7

Mandelker, *Investment-Backed Expectations: Is There A Taking?*, 31 Washington University Journal of Urban and Contemporary Law (1987), at 14..... 23

## TABLE OF ABBREVIATIONS

The following abbreviations are employed in this brief:

| | | |
|---|---|---|
| 1. | **App.** | – Appendix to Kelly's Petition for Writ of Certiorari |
| 2. | **Ex.** | – Exhibit in Evidence Before The Trial Court |
| 3. | **Hilltop Lots** | – Lots 33, 34, 35, 36, 37 & 38 of Uppaway Estates |
| 4. | **IPES** | – TRPA's Individual Parcel Evaluation System |
| 5. | **Kelly** | – Petitioner William Cody Kelly, Trustee |
| 6. | **Pet.** | – Kelly's Petition for Writ of Certiorari |
| 7. | **R.** | – Record on Appeal Before The Nevada Supreme Court |
| 8. | **TRPA** | – Respondent Tahoe Regional Planning Agency |
| 9. | **Uppaway** | – Uppaway Estates, Kelly's Planned Unit Development |
| 10. | **1969 Compact** | – Tahoe Regional Planning Compact, Pub. L. 91-148, 83 Stat. 360 (1969); Cal. Gov. Code §§ 66800 & 66801; NRS 277.190 & 277.200 |

## TABLE OF ABBREVIATIONS – Continued

| | | |
|---|---|---|
| 11. | **1980 Compact** – | Tahoe Regional Planning Compact, as amended, Pub. L. 96-551, 94 Stat. 3233 (1980); Cal. Gov. Code §§ 66800 & 66801; NRS 277.190 & 277.200 |
| 12. | **1984 Plan** – | The TRPA Regional Plan, adopted April 26, 1984 |
| 13. | **1987 Plan** – | The TRPA Regional Plan, adopted June 25, 1987 |

No. 93-548

In The

# Supreme Court of the United States

October Term, 1993

WILLIAM CODY KELLY, Trustee,

*Petitioner,*

vs.

THE STATE OF CALIFORNIA,
THE STATE OF NEVADA,
TAHOE REGIONAL PLANNING AGENCY,

*Respondents.*

**Petition For Writ Of Certiorari**
**To The Supreme Court Of The State Of Nevada**

## BRIEF IN OPPOSITION OF RESPONDENT TAHOE REGIONAL PLANNING AGENCY

The Tahoe Regional Planning Agency (TRPA), Respondent, respectfully submits this brief in opposition to the Petition for Writ of Certiorari to The Supreme Court of The State of Nevada, dated October 5, 1993, filed herein by Petitioner William Cody Kelly, Trustee (Kelly), which petition was received by Respondent on October 6, 1993.

# I

## STATEMENT OF THE CASE[1]

### A. NATURE OF THE CASE

This case involves the environmentally fragile enclave in the Lake Tahoe Basin and the special approach there to land use regulation. It focuses upon the effort by TRPA,[2] an entity created by interstate compact, to stem continuing, precipitous decline of Lake Tahoe's once-pristine water quality and environs. The action concerns application of TRPA's 1987 regulations to six sensitive Hilltop Lots situated in Uppaway, a nearly-built-out, upscale subdivision developed by Kelly on the shore of the lake near Glenbrook, Nevada.

While Kelly challenged TRPA's 1987 Plan, including its IPES program, as in violation of Fifth and Fourteenth Amendment takings and due process proscriptions, the Nevada trial court in a 128-page decision – reached after

---

[1] That we have not described the decisions below does not mean we concur in Kelly's description of them. *See* Pet. at 6-9. Indeed, he distorts the rulings by discursively isolating bits and pieces out of context. And while we shall deal with his mischaracterizations in the text below, the essence of the rulings is apparent both from this Statement of The Case and a brief perusal of portions of the appendices to the petition. App. A 1-20; App. D 2-23. We are also mindful of the admonition that a brief in opposition "shall be as short as possible. . . . " Sup. Ct. R. 15.3. The abundance and complexity of the facts of this case, however, coupled with Kelly's mis-descriptions of them, necessitated a lengthy Statement of The Case.

[2] Terms represented by abbreviations such as "TRPA", "Hilltop Lots", "Uppaway", "IPES" and others frequently used in this brief are referred to in the Table of Abbreviations immediately preceding the title page.

nearly five weeks of trial, testimony of numerous lay and expert witnesses and a surfeit of documentary evidence – sustained the measure: it neither lacked scientific underpinning nor deprived Kelly of economically viable use of the Hilltop Lots. The Nevada Supreme Court unanimously affirmed.

## B. THE LAKE TAHOE BASIN

The Lake Tahoe Basin rests over 6,000 feet above sea level in the Sierra Nevada, occupying 324 square miles astride the Nevada-California border. Lake Tahoe, the focal point of the basin, is surrounded by magnificent mountain peaks, some almost a mile higher than the surface of the lake. Descending abruptly from the peaks and ridges to the lake's edge, the lands within the basin are quite steep, with about three-quarters of the area comprising slopes in excess of 30 percent. Ex. C-5, p. 7.[3]

The tenth deepest in the world, Lake Tahoe is "ultra-oligotrophic", characterizing a lake extremely clear and having few nutrients otherwise supporting growth of algae. Until recently, the lake had a 10,000-year history of

---

[3] The basin's resplendent beauty, coupled with proximity to California's population centers, has marked it the quintessential retreat. But in the prescient words of the California Supreme Court, "there is good reason to fear that the region's natural wealth contains the virus of its ultimate impoverishment." *People ex rel. Younger v. County of El Dorado*, 96 Cal. Rptr. 553, 487 P.2d 1193, 1195 (Cal. 1971).

being at or near equilibrium in the gain and loss of nutrients. *Id.* at 8-9; App. A 2.[4]

Once disturbed, soil in the Lake Tahoe Basin is unable to function as a medium for growth of vegetation and storage of nutrients. Disturbance also causes increased sediment loads to Lake Tahoe, in turn resulting in storage of nutrients in the lake, rather than in the watersheds where they belong. *See* Ex. E-11 c., p. 30; App. A 2.[5]

Lake Tahoe is experiencing a downward trend in water quality. Because of increased sediment, there has been a decline in annual average depth of visibility from 31.2 meters in 1968 to 27.6 meters in 1981 and a drop in winter clarity from an average 33.6 meters in 1968 to 14.9 meters in 1981. There has been a corresponding 110 percent surge in algae from 1959 to 1980. Ex. C-5, p. 12. Lake

---

[4] Dr. Charles R. Goldman, the eminent limnologist from the University of California at Davis, and perhaps the scientist most familiar with Lake Tahoe, testified that the lake retains its water for approximately 700 years. That is a result of its enormous volume, 156 cubic kilometers, very small watershed, single outfall and limited inflows. 47 R. 1007-1008. Hence, water flowing into the lake is going to be there a long time, so that accompanying nutrients tend to accumulate and promote increasing algal growth. *Id.* at 1009; *see generally* App. D 9 & 12-16.

[5] The recent annual suspended sediment load to Lake Tahoe from surface runoff is approximately 27,000 metric tons, about *four* times the natural load. Isolated examples of development have revealed suspended sediment concentrations 100 to 1,000 times the natural. These elevated amounts of sediments, accompanied by nutrients, cause an increase in algal productivity and a decline in the clarity of the lake. Ex. E-11 c., p. 31.

Tahoe is losing transparency at nearly a half meter *per year*. 47 R. 1015; App. A 3 & D 10.

Residential development at Lake Tahoe boomed in the years surrounding enactment of the 1969 and 1980 Compacts (*post*). *See generally* 54 R. 2040-2050. At the height of planning activities under the 1980 Compact, there were about 19,000 to 20,000 vacant lots in the Tahoe Basin. *Id.* at 2082. In 1989, the year TRPA's IPES system was implemented, there were approximately 12,000 vacant lots remaining. *See* 54 R. 2082.[6]

## C. KELLY'S ACQUISITION OF THE 44-ACRE PARCEL

Aware of possible creation of an interstate agency to address environmental problems at Lake Tahoe (35 R. 522-523), Kelly in 1966 acquired the single, 44-acre parcel that was to become Uppaway. *Id.* at 493-494; App. D 2. He paid $500,000 cash for the land. 35 R. 494. The Fleischmann Mansion, a 7,500-square-foot home, existed on the parcel and was an object of Kelly's desire for a residence before the purchase. *Id.* at 494-495. The property also contained a caretaker's residence and guest house. *Id.* at 496-497. Kelly had retained a consultant to assure himself that, when spending $500,000 for a residence, he would be able to recoup his investment through subdivision development. *Id.* at 503-505. In short, he wanted to be sure of regaining his $500,000 by selling the

---

[6] A decline in lots after 1983 was the result primarily of federal and state land-purchase programs. 54 R. 2082.

residence and enough land to produce that amount. *Id.* at 505; App. D 2.

Kelly lived in the mansion from 1966 through 1984. 35 R. 496; App. D 2. He later sold it for $1,100,000 (35 R. 543; App. D 4), but continued to maintain a residence in the guest house. 36 R. 582-583.

## D. THE 1969 TAHOE REGIONAL PLANNING COMPACT

Following decades of efforts to grapple with development pressures and environmental deterioration at Lake Tahoe (*see generally* 48 R. 1152-1160), capped by the Report of the Lake Tahoe Joint Study Committee in the mid-1960's (Ex. 26), the States of California and Nevada enacted the 1969 Compact. Pub.L. 91-148, 83 Stat. 360; Cal. Gov. Code §§ 66800 & 66801; NRS 277.190 & 277.200. Establishing an agency described as the "*sui generis* [offspring] of a marriage between sovereign partners", *People of St. of Cal. ex rel. Younger v. Tahoe Reg. P. Ag.*, 516 F.2d 215, 218 (9th Cir. 1975), *cert. denied*, 423 U.S. 868 (1975), the 1969 Compact mandated TRPA's adoption of a regional plan of resource conservation and orderly development. 1969 Compact, Art. I(c); App. D 3.

Due to structural defects[7] in the accord, including the synergistic confluence of Article III(g)'s voting procedure

---

[7] A number of the deficiencies in the 1969 Compact are treated in 3 K. Manaster and D. Selmi, *California Environmental Law and Land Use Practice*, § 64.04(6) (1990). While early federal and state efforts to revise the faulty compact failed, continuing discussions ultimately resulted in the 1980 Compact (*post*), under which TRPA's current regulations were adopted. *See generally* 48 R. 1177-1189.

and Article VI(k)'s allowance of major projects to be "deemed approved" absent a vote constituting "action" (App. A 4), there arose acute concerns over TRPA's ability to address the problems besetting Lake Tahoe. 48 R. 1177-1180; *see* App. D 3.

## E. THE CREATION OF UPPAWAY ESTATES

Uppaway was a 39-lot planned unit development, of which Lots 33 through 39, the Hilltop Lots, comprised Phase III. The project was described by Kelly as a "*sited* parcel land sale program." Ex. 39, p. 26 (emphasis in original). Most of Uppaway was located in a TRPA land capability district allowing one percent land coverage. 46 R. 817-818.[8] Kelly received a variance, however, for approximately seven percent land coverage in the one percent area. Ex. 39, p. 23. Uppaway was "deemed approved" by TRPA under the 1969 Compact, even though it received seven negative votes and only two affirmative ones by TRPA board members. Ex. 1, p. 2; App. D 3-4. The project's "deemed-approved" status was confirmed by an unpublished federal court order in *Tahoe*

---

[8] TRPA employs a scientific system of "land capability" classification, allocating maximum amounts of impervious surface depending upon, *inter alia*, the erosion and runoff potential of soils and the steepness of slopes on which they rest. The method was devised by Dr. Robert G. Bailey, a geomorphologist, and is articulated in his report, *Land-Capability Classification of The Lake Tahoe Basin, California-Nevada: A Guide For Planning*, Robert G. Bailey (1974). Ex. 2-6.

*Regional Planning Agency v. Douglas County, et al.*, No. R-75-130 (D. Nev., Oct. 24, 1975).[9]

While immediately building infrastructure and commencing sales of lots in Phases I and II, Kelly did not start even off-site improvements, such as the road, for the Hilltop Lots (Phase III) until 1982. He first wanted to see how sales of lots in Phases I and II proceeded. 35 R. 626. The hilltop improvements were not completed until 1983. Ex. 1-41; App. A 7 & D 8.[10]

---

[9] What was deemed approved was a 39-lot subdivision and land coverage variance. Kelly himself described Uppaway as a "*sited* parcel *land sale* program." Ex. 39, p. 26 (emphasis of "land sale" added). The approval, therefore, was of building sites only, not homes. TRPA has never questioned the validity of Uppaway's creation; nor has the Nevada Supreme Court. Contrary to Kelly's representation (Pet. at 8 n. 10), the Nevada high court affirmed the project's lawful existence and substantial coverage variance. App. A 19. *When* the lots would be built upon, however, the focus of IPES (*post*), was correctly determined by the Nevada tribunal as beyond the ambit of Uppaway's approval and the federal court order confirming it. *Id.* at 18-19.

[10] These undisputed facts betray repeated misstatements by Kelly that he has been delayed development "for 19 years". Pet. 4, 6, 10 & 25. Having not even readied the Hilltop Lots for residential construction until 1983, that simply is *not* the case. Moreover, due to a federal court injunction lasting from 1984 through mid-1987 (*post*), TRPA was legally unable to approve homes on the hilltop once it was improved. The petition's implications of privation are also belied by Kelly's sales, as of July 1989, of 24 lots in Phases I and II for the total sum of $5,236,000. 47 R. 938; Ex. ZD.

## F. IMPLEMENTATION OF THE 1980, AMENDED TAHOE REGIONAL PLANNING COMPACT

**1. The 1980 Compact.** Due to the failure of the 1969 Compact to cope with mounting degradation of the Lake Tahoe Basin, the states, with Congress' approval, extensively amended the accord in December, 1980. Pub.L. 96-551, 94 Stat. 3233 (1980); Cal. Gov. Code §§ 66800 & 66801; NRS 277.190 & 277.200.[11] In terms far more exigent than its predecessor, the 1980 Compact accentuated growing threats to the ecology of the region and declared the need to establish "environmental threshold carrying capacities,"[12] along with a plan achieving them while providing orderly growth. 1980 Compact, Art. I(a); App. D 5. It made a number of significant changes to the 1969 Compact, including stricter project-review standards. App. A 5 n. 4.

The 1980 Compact required TRPA to adopt the environmental threshold standards within 18 months after December, 1980 (1980 Compact, Art. V[b]), and amend its regional plan to achieve and maintain them within one year after that. *Id.*, Art. V(c). The compact also mandated

---

[11] The background of the 1980-amendments to the Compact and the planning process they spawned are treated in *People of California v. Tahoe Regional Plan Agency*, 766 F.2d 1308, 1310-1312 (9th Cir. 1985).

[12] "Environmental threshold carrying capacities", defined in Article II(i) of the 1980 Compact, were performance standards for maintenance of components of the Tahoe Basin's ecosystem. They included, among others, bench marks for air and water quality, soil conservation and vegetation preservation. The standards were adopted in August, 1982. App. D 6.

that all projects be directly, versus "deemed", approved by the agency. *Id.*, Art. VI(b).[13]

**2. Ordinance 81-5.** As a first step toward implementing the 1980 Compact, TRPA in June, 1981, enacted Ordinance 81-5, representing a coalescence of TRPA's responsibilities both as an area-wide planning agency under Section 208 of the Federal Clean Water Act (33 U.S.C. § 1251 *et seq.*) and to insure the amended plan required by the compact would not be outstripped by precipitate development of high-hazard lands. Ex. 32, §§ 1.10, 1.20 & 1.30. Public hearings had indicated that, absent quick action, serious degradation in water quality "may irreversibly damage Lake Tahoe and the Lake Tahoe region." *Id.*, § 1.40. In response, Ordinance 81-5 established a discretionary, "case-by-case" permit system for residential development on the most environmentally sensitive land capability districts, including District 1 comprising the Hilltop Lots. *Id.*, § 2.00; App A 5 n. 4. The process was designed to give TRPA a measure of breathing room in its attempt to solve the conundrum of thousands of single-family lots on sensitive lands and pressing demands to develop them. (During early efforts to implement the 1980 Compact, there were 19,000-20,000 vacant lots in the Tahoe Basin. 54 R. 2082.)

---

[13] TRPA was required to define by ordinance which activities were not "projects" and thus exempt from TRPA approval. 1980 Compact, Art. VI(a). In February, 1981, TRPA adopted Ordinance 81-1 for that purpose. Ex. 31. Contrary to Kelly's assertion (Pet. at 4), Ordinance 81-1 did *not* apply "exclusively" to Uppaway: it was a basin-wide measure. Indeed, as the trial court found, Ordinance 81-1 was evenly applied and did not deny Kelly equal protection of the laws. App. D 20.

Shortly after adoption of Ordinance 81-5, Uppaway Development Company, Kelly's corporation, applied to TRPA for approval of a residence on one of the Hilltop Lots. TRPA advised Kelly, however, that to be eligible under Ordinance 81-5, off-site improvements for the lot, such as roads and drainage structures, were required to be in place. *See* Ex. 1-7; Ex. 32, §§ 12.11 & 12.21; App. A 5-6. In early 1982 Kelly again was told by the agency of the need for those improvements as a prerequisite for residential development. *See* Ex. 1-11.

In July, 1982, TRPA approved Kelly's plans for hilltop off-site improvements as in accordance with the subdivision map "deemed approved" under the 1969 Compact.[14] 34 R. 236-237; Ex. A-17. Shortly after approval of the plans, Kelly filed applications under Ordinance 81-5 for single-family residences on the Hilltop Lots. Ex.'s 25 through 29. Kelly agreed to proceed under Ordinance 81-5 (34 R. 239) and hence was to follow the normal, *discretionary* case-by-case review procedure before building permits could be approved. *See* App. D 7. While this occurred in mid-1982, the improvements for the Hilltop Lots, as we have noted, were not completed until October, 1983. *See* Ex. 1-41; App. D 8.

Hundreds of applications similar to Mr. Kelly's were pending before TRPA at the time. App. B 6-7. Moreover, as

---

[14] TRPA's approval of the improvement plans was necessary because Kelly, along with changes to lot configurations on the hilltop, had proposed constructing a road to access the area instead of the cable railway envisioned by the subdivision map deemed approved. *See* Ex. 1-20.

the trial court observed, TRPA was faced with the "difficult and time-consuming task of implementing the novel and complex planning approach of the 1980 Compact, including its pressing deadlines for the adoption of environmental threshold carrying capacities and a new plan and ordinances attaining and maintaining them. . . ." App. D 35. Added to that task was "resolving the dilemma of what to do about the 17,000, more or less, preexisting single-family lots, of which Mr. Kelly's holdings were a portion." *Id.*[15]

Although Kelly's applications under Ordinance 81-5 became eligible for approval in 1983 (Ex. A-29), TRPA on August 26, 1983, temporarily suspended issuance of permits, pending adoption of the new regional plan required by the 1980 Compact. Ex. A-32, p. 3. TRPA counsel had advised the agency it no longer could approve projects because the new plan prescribed by the compact was overdue (*id.* at 1; App. D 8): Article V(c) had required the plan be enacted within *one year* after adoption of the environmental thresholds. The latter were approved

---

[15] Kelly portrays TRPA's treatment of him in the early 1980's as a parade of horrors. *See* Pet. at 4. The trial court, however, repeatedly found TRPA's actions to be fair and reasonable. *See, e.g.*, App. D 20 (Kelly failed to prove TRPA's conduct was the product of inaction or discrimination toward him); *Id.* (no evidence of fraud or malice on the part of TRPA); App. D 35 (no evidence of intentional neglect or malice over the winter months of 1983-1984); App. D 36 (despite delays, actions of TRPA were reasonable and justified under all the circumstances).

August 26, 1982, the one-year deadline thus expiring August 26, 1983.[16]

**3. The 1984 Plan**. On April 26, 1984, TRPA adopted an amended plan representing its first, albeit unsuccessful attempt to comply with the mandates of the 1980 Compact. *See* Ex. A-35; App. D 8. The ordinance enacting the plan permitted continued, discretionary issuance of permits for then-pending applications under Ordinance 81-5. Ex. A-35, p. 14. As a result, Kelly's Hilltop-Lot applications would have been processed under Ordinance 81-5, as opposed to the new rules prescribed by the 1984 Plan. 34 R. 249-250; App. D 8.

Culminating a historic planning process of dimensions not even the framers of the 1980 Compact could have foreseen (Ex. A-35, § 1.25; *see People of California v. Tahoe Regional Plan Agency*, 766 F.2d at 1311-1312), the 1984 Plan attempted to balance acute pressures for development with consumption of scant remaining resources in a manner TRPA felt – *incorrectly* – was in compliance with the environmental thresholds. On April 26, 1984, the very day TRPA adopted the plan, the State of California and League to Save Lake Tahoe sued TRPA, alleging the plan violated the 1980 Compact. *People of California v. Tahoe Regional Planning Agency*, No. CIV-S-84-0561-EJG, United States District Court, Eastern District of California (1984). App. D 8. TRPA's approval of projects under the disputed plan was immediately halted by a temporary

---

[16] The trial court determined TRPA's suspension of permits "was done in good faith for a significant public purpose and was reasonable in duration given the complexity of the tasks undertaken." App. D 22.

restraining order (34 R. 250-251), followed by a preliminary injunction on August 9, 1984. App. D 8-9. The preliminary injunction was affirmed on appeal. *People of California v. Tahoe Regional Plan Agency*, 766 F.2d 1308.

The 1984 Plan thus never took effect. *Tahoe-Sierra Preservation v. Tahoe Reg. Planning*, 938 F.2d 153, 155 (9th Cir. 1991). Because of the injunction, TRPA was unable to act upon projects, including residences on the Hilltop Lots, until after adoption of the 1987 Plan settling the litigation. *See* 34 R. 251; App D 9.

**4. The 1987 Plan**. Following its unsuccessful appeal to the Ninth Circuit, and while still under preliminary injunction, TRPA instituted a "Consensus Building Workshop" to obtain the broadest possible range of private and governmental viewpoints on the makeup of a new regional plan. As a result of the negotiations, tentative agreements on various elements of a plan began to emerge in late 1986. App. B 7; *see generally* Exs. Z & D-9. On June 25, 1987, TRPA adopted the 1987 Plan, the product of the consensus discussions. Ex. F-18. That action settled the 1984 Plan lawsuit, which was dismissed July 15, 1987.

The 1987 Plan, presently in effect, is designed to attain and maintain the environmental threshold carrying capacities while allowing orderly development. It contains elements addressing land use, recreation, conservation, public facilities and implementation. 51 R. 1591-1592. The plan also incorporates "planning area statements" for 175 planning areas in the Lake Tahoe Basin. Akin to zoning maps, the statements prescribe density and permissible uses. 51 R. 1592-1593. Planning

Area Statement No. 059, applicable to Uppaway, *permits* single-family residential development at a density of one unit per acre. 51 R. 1636; Ex. I-2.

The keystone of the 1987 Plan, in terms of residential development, is IPES, a scientifically-based system for gradual build-out of all vacant residential lots in the Lake Tahoe Basin, excluding those in stream zones (inapplicable here). IPES is designed to direct construction initially to those areas most suitable for it in accordance with environmental thresholds. Ex. I-1, p. VII:3; App. A 8.

When IPES was under consideration by the Consensus Building Workshop there were approximately 18,000 vacant residential parcels (52 R. 1738); and demand to use them far exceeded the basin's ability to accommodate the development. With uncontrolled building portending permanent loss of Lake Tahoe to eutrophication, a priority system, such as IPES, was needed to allow the most suitable, in terms of protecting the lake's water quality, to be built upon first. 48 R. 1212; App. D 10.

As of December 31, 1988, all vacant residential parcels in the basin, approximately 12,000 by that time (*see* 52 R. 1746), had been evaluated by "IPES teams" consisting of a soil scientist, hydrologist and an engineer or land use planner. Ex. I-3, § 37.5; App. A 8; App. D 11. Applying set criteria, including "relative erosion hazard" and "runoff potential," the teams determined scores for all lots. Ex. I-3, § 37.2; 52 R. 1747-1783. Having assembled the scores, the TRPA Governing Board statistically established 725 as

the "IPES line", with parcels scoring above it eligible to receive building permits. 51 R. 1625; App. A 8; App D 11.

Due to the injunction against the 1984 Plan and adoption of the 1987 version, Kelly was required to have the Hilltop Lots evaluated under IPES. App. D 10-11.[17] When that occurred, one of the six was given a passing score of 758. Ex. 2-2; 28 R. 8295. That lot immediately became eligible to receive a development allocation and building permit. 28 R. 8295. Prior to trial, Kelly had appealed the remaining IPES scores as allowed by TRPA regulations. 28 R. 8295. As a result, a second of the six lots received a passing score. 28 R. 8295; Ex. YYY.[18]

---

[17] Kelly asserts – understandably *without* citation to the record – that there was a "concession at trial" that the 1975 court order confirming Uppaway's "deemed-approved" status "took the [Hilltop Lots] out of the strictures imposed by IPES." Pet. at 5 n. 4. There was, to be sure, *no* such TRPA capitulation at trial or elsewhere. Indeed, the trial court's erroneous exemption of the lots from IPES (App. B 100) directly led to TRPA's successful cross-appeal. The Nevada Supreme Court ruled that Kelly, although having approved lots and land coverage, nonetheless was subject to IPES' principal attribute of directing timing of construction. App. A 17-19.

[18] The post-appeal IPES scores for the four non-passing lots were 693, 694, 702 and 725. App. D 11. The scores were sufficiently near the 725-level to make Kelly eligible in 1990 to purchase IPES points, as permitted by Section 37.2 I, including Appendix J, of Chapter 37 of the TRPA Code of Ordinances. Ex. I-3. (The money paid would be deposited into a TRPA fund earmarked for water-quality improvement projects.) At $672 per point, the sum presently assessed (*id.*), Kelly could cause *all* of his lots to pass the IPES line by spending $60,480.

The numerical level defining top-ranked parcels under IPES, initially set at 725, may be lowered in any local jurisdiction on an annual basis. Ex. I-3, § 37.8.C. Lowering of the line is dependent upon findings by TRPA, *inter alia*, that progress is being made in the jurisdiction on capital improvements for water quality. *Id.*, § 37.8.C(1). It will take approximately two to three years for the IPES line to reach Kelly's Hilltop Lot with the lowest IPES appeal score. 53 R. 1881-1883.[19]

## G. THE ECONOMIC IMPACT OF TRPA'S REGULATIONS

The trial court found the Hilltop Lots maintained current, substantial values under the 1987 Plan and that the plan, including IPES, did not deny Kelly their economically viable use. App. D 18 & 21. Kelly's own expert appraiser testified that the lots – in the presence of IPES –

---

[19] Kelly harps of a TRPA "concession" that he may never be allowed to build residences on the Hilltop Lots. Pet. at 6 & 9 n. 11. He disingenuously cites as "evidence" minutes of a *post*-trial TRPA meeting (Pet. at 9 n. 11), which were *stricken* by the Nevada Supreme Court because they were not part of the record on appeal. App. A 20 n. 18. Kelly fails, moreover, to acknowledge that two of the six lots already have passed IPES. App. A 13. And he ignores TRPA's expert's opinion on movement of the IPES line (53 R. 1881-1883), the scholarliness of which convinced the trial court and the Nevada Supreme Court. App. B 67; *see* App. A 15-16. Indeed, as the trial court observed, "Mr. Ziegler and others testified that in the next several years the 725 point cut-off line is likely to move downward. The line needs to be lowered by only 33 or less points to make all four remaining lots eligible." App. B 75. Furthermore, Kelly's position is undermined by his ability to purchase IPES points. Fn. 18, *ante*.

were worth $2,025,000. App. B 45-46; *see* Ex. ZY, p. 16. And that as of January 1, 1982, five years before IPES, they were worth $1,825,000. App. B 46. It thus was Kelly's expert's opinion that from 1982 through 1987, transcending Ordinance 81-5 and the 1984 and 1987 Plans, five of the six Hilltop Lots suffered *no decrease* in market value. 55 R. 2300-2301. And the sixth maintained substantial value as well. Ex. ZY, p. 16. During oral argument before the Nevada Supreme Court, Kelly acknowledged the lots were worth "between two and four million dollars." App. A 15 n. 14.

As of July 1, 1989, retail sales of 24 non-Hilltop Lots at Uppaway had produced an aggregate gross sum of $5,236,000. 47 R. 938. Also, eight unsold non-Hilltop Lots were valued at $710,000 as of the same date. 47 R. 939-940; Ex. ZE. Once again at oral argument, Kelly admitted he had already received approximately $5,600,000 from prior sales at Uppaway. App. A 16 n. 16.

## II

## REASONS FOR DENYING THE PETITION

### A. SUMMARY

The petition should be denied. The issues raised are not nationally significant; nor are they likely to recur. Moreover, on these unusual, complex facts the ruling of the Nevada Supreme Court clearly was correct. Finally, Kelly's preemption argument has no legal vitality: the case likely would have been decided identically under the Nevada Constitution.

## B. THE ISSUES HERE – ASSUMING THEY CLEARLY EMERGE AT ALL – ARE NOT NATIONALLY IMPORTANT QUESTIONS OF FEDERAL LAW

The reach of the issues at bench is decidedly narrow. Land use and environmental planning for the Lake Tahoe Basin does not lend itself to questions of national significance. Indeed, the unique processes challenged by Kelly are driven by the equally exceptional qualities of the basin. Planning for Lake Tahoe's extraordinary ecosystem and developmental patterns, quite simply, is like planning for no other place on earth. Thus, although most cases of the takings genre turn principally upon their facts, the facts here are so unusual as to render the Nevada Supreme Court's decision applicable virtually to Lake Tahoe alone.

This case's confines are impelled, moreover, by the factual labyrinth both lower courts were required to navigate to reach their decisions: trial transcripts alone consumed over 2,600 pages; documentary evidence literally would fill a small room. Steeped in an exceptional factual array, a case as this is not likely to reappear.

A decision by this Court on the issues Kelly raises thus would be so novel as to severely constrain its precedential value. We respectfully submit the petition should be rejected for this reason alone.

## C. THE NEVADA SUPREME COURT PROPERLY CONDUCTED THE AD HOC, FACTUAL INQUIRY: THE EVIDENCE DEMONSTRATED THE HILLTOP LOTS WERE ALLOWED BENEFICIAL, RESIDENTIAL USE AND MAINTAINED HIGH MARKET VALUES REFLECTING IT. KELLY'S REASONABLE, INVESTMENT-BACKED EXPECTATIONS ALSO WERE SATISFIED.

**1. The Ad Hoc, Factual Inquiry**. A zoning regulation effects a Fifth-Amendment taking if it does not "substantially advance legitimate state interests"[20] or denies an owner "economically viable use" of his or her land. *Agins v. Tiburon*, 447 U.S. 255, 260 (1979). Rather than establish a set formula for a taking, this Court has mandated resort to an "ad hoc, factual inquiry" probing the economic impact of the regulation, its interference with reasonable, investment-backed expectations and the character of the governmental action.[21] These inquiries " 'must be conducted with respect to specific property, and particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.' " *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495 (1987).

---

[20] The substantial-advancement prong of takings calculus was not an issue before the Nevada Supreme Court and has not been raised here.

[21] The character of TRPA's regulations, in terms of whether they physically encroached upon Kelly's property, also is not at issue. *See generally Yee v. City of Escondido, Cal.*, 503 U.S. ___, 112 S.Ct. 1522, 1534 (1992). Kelly acknowledged to the Nevada Supreme Court that "the character of the governmental action in this case cannot be considered a physical invasion. . . . " Kelly Op. Br. at 37.

**2. Kelly Has Suffered No Unconstitutional Economic Impact.** The evidence below established Kelly's Hilltop Lots were – and are – permitted residential use under the 1987 Plan and IPES.[22] And there is no more persuasive evidence of the economic vitality, or viability, of that use than the value of the lots, conceded by Kelly as between $2,000,000 and $4,000,000. App. A 15 n. 14.[23]

---

[22] Kelly seriously misunderstands or miscasts IPES when he asserts: "[N]o new subdivision lots had been approved under IPES since 1982." Pet. at 24. Indeed, IPES was not even a part of TRPA's regulations until *1987*. Up to that time, TRPA had employed interim, single-family home approval mechanisms, such as Ordinance 81-5, followed by the 1984 Plan which allowed similar permits. Approvals from mid-1984 through mid-1987, however, were forbidden due to California's injunction. Further, IPES is not a program to review creation of *new* subdivision lots, but instead to allow gradual development of the thousands extant. Equally meritless is Kelly's assertion that IPES is a temporary taking. Pet. at 24. Lots retaining consistent, saleable values as Kelly's hardly have been "taken", and as noted in Footnote 18 (*ante*), Kelly since early 1990 has been able to purchase IPES points to render the four non-passing lots immediately developable. Further, Kelly throughout the 1987 Plan has enjoyed significant transfer of development opportunities. *See* Ex. I-3, §§ 20.3, 34.2 & 34.3.

[23] Kelly attacks the Nevada Supreme Court's ruling by surprisingly portraying this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886 (1992), as gauging "economically viable use" in terms of "use" alone, exclusive of the value of the property allowed that use. Pet. at 21-23. Aside from disregarding *Lucas'* facts (*post*), Kelly's reasoning is a *non sequitur*: one cannot so simply sever value from use; indeed, a use is *economically* viable in terms of the value attributable to it. And that attribution is measured by market value of the land. Kelly has failed not only to show absence of value, but even diminution. Further, his insistence upon use of "current fair market value" (Pet. at 24) ought fall on deaf

That even Kelly viewed the lots' values as integral to the takings inquiry is manifest from his presentation to the Nevada Supreme Court: "The court compares *the market value* of what has been taken with the *value remaining* after the government's challenged action." Kelly Op. Br. at 37 (emphasis added). The courts below made precisely that comparison, establishing that Kelly had suffered no unconstitutional economic impact.[24]

**3. Kelly's Reasonable, Investment-Backed Expectations Have Been Satisfied**. As much as he tortures *Lucas*, 112 S.Ct. 2886, in hopes of obscuring the use and value of the Hilltop Lots, Kelly misapplies *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (Pet. at 11-15 &

---

ears. The appraisal evidence at trial – including his own – after all showed substantial *current* values. Finally, Kelly forgets that *Lucas* involved a regulation flatly prohibiting any structure on the plaintiff's lots, causing the state court to find them *valueless*. *Lucas*, 112 S.Ct. at 2889. And the lower court's finding of no value "was the premise of the Petition for Certiorari" and the factual assumption underlying this Court's decision. *Id.* at 2896 & n. 9.

[24] Rather than forthrightly address the undisputed use and value of his property, Kelly is content to attack the decisions below through excerpting snippets, which standing alone distort the rulings. For example, Kelly repeatedly quotes a single sentence of the trial court's opinion, to the effect that it is difficult, if not absurd, to avoid calling TRPA's ordinances a temporary taking. Pet. at 7-8 & 24. The quotation, however, is torn from its context: immediately after it the court proceeded with its analysis *sustaining* the regulations. App. B 84. The cited remark, to be sure, is nothing more than rhetorically fitting hyperbole establishing a point of departure for the court's validating discussion.

20-21), essentially asking this Court to omit the expectations factor – and again neglect the truth. Kelly would just as soon forget that the genesis of the Hilltop Lots was a single, 44-acre parcel for which he paid a single $500,000; that he expected to purchase a home, the Fleischmann Mansion, and secure return of his investment if necessary by development. We must respectfully ask: what more could Kelly have anticipated – even dreamed of – than to live in the mansion nearly 20 years, sell it for over a million dollars and end up with the Hilltop Lots, *alone* worth $2,000,000 - $4,000,000? And that is not to mention developing a luxury subdivision producing approximately $5.6 million to date, including proceeds from the mansion. Surely a reasonable person would be content.[25]

Apart from his abundant return, it should have been no surprise to Kelly that his land would become subject to extraordinary interstate regulations to protect the equally exceptional Alpine lake, a portion of whose waters his property abutted. Indeed, Kelly was aware in 1963 – three years *before* his purchase – of the potential onset of a regional agency to protect the lake. And his awareness no doubt was more acute in 1969 when, five years before he subdivided his land, TRPA was created and mandated to enact a plan for the area. Expectations, to be reasonable, after all must "take into account the

---

[25] "Reasonable", in terms of "reasonable, investment-backed expectations", implies the expectation must be "appropriate under the circumstances", an objective test. Mandelker, *Investment-Backed Expectations: Is There A Taking?*, 31 Washington University Journal of Urban and Contemporary Law (1987), at 14.

power of the state to regulate in the public interest", including modification of land use rules when it perceives the need for change. *Pace Resources, Inc. v. Shrewsbury Tp.*, 808 F.2d 1023, 1033 (3d Cir. 1987), *cert. denied*, 482 U.S. 906 (1987), *reh'g denied*, 483 U.S. 1040 (1987). And those expectations only could have been diminished when Kelly, notwithstanding the late 1970's being awash in rumblings of dissatisfaction with the 1969 Compact, eschewed development of the Hilltop Lots until over two years *after* the 1980 amendments were adopted. One doing business in a regulated field, especially a sophisticated attorney-developer as Kelly, simply must expect legislative schemes to be altered by subsequent amendments to achieve as-yet unattained goals. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 227 (1986); *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-1009 (1984).

In sum, and in spite of his intractably revisionist approach to the evidence below, Kelly received more than he reasonably could have expected: he obtained the home he desired and *far* more money than necessary to cover his investment. His reasonable, investment-backed expectations, therefore, were satiated.

**4. Kelly's *Penn Central* Argument Need Not Be Reached, But In Any Event Does Not Fit This Case And Presents No Reason To Grant Certiorari.** Kelly contends the Nevada Supreme Court "misapplied" the observation in *Penn Central Transp. Co. v. City of New York*, 438 U.S. at 130-131, that " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. [T]his Court focuses rather . . . on the

nature and extent of the interference with rights in the parcel as a whole. . . . " Pet. at 11-21. Kelly's argument is to no avail, however, because this Court need not reach it; but if it did, his contention does not fit this case. Kelly's view, moreover, conflicts with the need to consider his investment-backed expectations.

**a. The Nevada Supreme Court Employed Grounds Other Than "The *Penn Central* Quotation" To Decide This Case, Rendering It Unnecessary To Reach The Issue.** While the Nevada Supreme Court referred to the *Penn Central* quotation, it did so only after observing:

> When considering the [economic-impact] factor, we note that Kelly's *lots remain valuable assets.* Kelly's own appraiser testified to the fact that the Hilltop lots maintained *substantial value* during the period of time in question.
>
> App. A 15 (emphasis added and footnote deleted).

In a footnote to its remark, the Nevada court stressed that "[d]uring oral argument, Kelly's counsel estimated the value of the Hilltop lots to be between two and four million dollars." App. A 15 n. 14.

The manifest propriety of the decision below thus rests comfortably upon the admitted value of the Hilltop Lots themselves. There was no need to look to other portions of Uppaway to sustain TRPA's regulations and hence none to review the Nevada court's application of the *Penn Central* quotation.

**b. This Case Presents The Same "Factual Context" As Kelly Insists Is Necessary for A Correct Reading of**

***Penn Central.*** The predicate for Kelly's *Penn Central* argument is missing: Kelly *does* enjoy reasonable return from his property.[26] *See generally* Pet. at 11-15. Kelly, as the plaintiff in *Penn Central*, hence cannot credibly argue that his lots, individually or in conjunction with Uppaway as a whole, have been taken. *See id.* at 14-15.[27] Indeed, in view of the factual history of this case, which he repeatedly side steps, Kelly finds himself precisely in the same position as the plaintiff in *Penn Central*: he contends he somehow is "entitled to something *more* than a reasonable return" on his investment. Pet. at 14 (emphasis added). And it is Kelly, to be sure, who, in spite of exponential fulfillment of his original expectations, wants to exploit

---

[26] One scarcely can envision more compelling evidence of reasonable return than the concessions of Kelly's appraisal witness and counsel that the Hilltop Lots, standing alone, maintained significant values. Or, for that matter, the acknowledgment of his appraiser that the lots suffered no diminution in value in the face of TRPA's regulations.

[27] Kelly beseeches the Court to level "a very uneven playing field" for developers. Pet. at 18 n. 22. That entreaty surely rings hollow in view of the plenty realized by Kelly from Uppaway. Moreover, the decisions below were evenhanded and exemplified no such extreme position as Kelly decries in his parenthetical missive to the Court. And that Kelly assertedly has "paid out (or owes) over $400,000" for improvements and TRPA costs and fees (*id.*) does not change the result. As the Hilitop Lots' values reflect, Kelly is enjoying the manifest *benefits* of those improvements. That he must pay costs attendant to an unsuccessful constitutional broadside is not to be laid at TRPA's doorstep. Distilled to its dubious essence, Kelly seems to be saying, "the more you spend, the more you deserve to win."

his property "to its *fullest* extent." *Id.* (emphasis in original).[28] His insistence that this case is foreign to the "factual context" in *Penn Central*, therefore, simply is not believable.[29]

**c. Kelly's Approach Is Designed To Circumvent Candid Analysis of His Reasonable, Investment-Backed Expectations.** Kelly chides the Nevada Supreme Court for "reaching back" 18 years and ignoring the intervening creation of separate lots under Nevada law. Pet. at 20-21.

---

[28] Kelly's repeated citation of cases such as *Deltona Corp. v. United States*, 657 F.2d 1184, 1191 (Fed. Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Jentgen v. United States*, 657 F.2d 1210, 1213 (Ct. Cl. 1981); *Ciampitti v. United States*, 22 Cl. Ct. 310, 319-321 (1991); and *City And County of San Francisco v. Golden Gate Heights Investments*, 14 Cal.App.4th 1203, 1209 (1993) (Pet. at 17-20), does not assist him. First, none appears to apply the *Penn Central* quotation in as egregious a fashion as Kelly maintains. Pet. at 17-18. More important, if the regulated portions of the plaintiffs' parcels in those cases indeed were "worthless" or "valueless", as Kelly contends (Pet. at 19-20), the cases only illuminate the gross disparity between Kelly's argument and the facts here. Those cases are not *this* case: the Hilltop Lots, as Kelly admits, are quite valuable. App. A 15 n. 14.

[29] Equally implausible is Kelly's likening of TRPA's regulations to the public easement whimsically exacted and rightfully denounced by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (Pet. at 11-12), or to the spate of flagrant physical appropriations and public uses held to be takings in the cases Kelly cites at page 12, Footnote 14, of his petition. Partial takings, whether by physical appropriation, overflight, public use or actions in eminent domain, do not even vaguely mirror regulation of private use of private property such as the Hilltop Lots. The important distinction between regulation of private use and physical or other direct governmental takings remains alive and well. *See Yee v. City of Escondido, Cal.*, 112 S.Ct. at 1534.

It is as though the Nevada tribunal was to have cast a sightless eye toward his acquisition of and expectations for the single, 44-acre parcel, of which the Hilltop was an *undivided* part – and for which Kelly paid the equally unitary sum of $500,000. The lower court apparently also was to have disregarded Kelly's near-20-year residence in the Fleischmann Mansion and sale of it for over twice the price for the entire 44 acres. And this is not to mention development of the remaining land.

Kelly, in sum, asks this Court to don blinders – literally to jettison reality *and* the ad hoc, factual inquiry. No case or text Kelly cites contemplates so untoward a notion. His argument thus is no reason to review this case.

## D. KELLY'S PREEMPTION ARGUMENT IS BEREFT OF VITALITY: HE FAILS HERE – AS HE FAILED BELOW – TO SHOW HOW THE CASE WOULD HAVE BEEN DECIDED DIFFERENTLY UNDER THE NEVADA CONSTITUTION

Kelly urges this Court to review the ruling by the trial court, affirmed without comment by the Nevada Supreme Court, that his takings claim under the Nevada Constitution was preempted by the 1980 Compact (16 R. 5209-5210). Pet. at 26-29. But when he raised the same question before the Nevada Supreme Court, TRPA argued he failed to show *how* the trial court's ruling, even if error, had denied him substantial justice. TRPA Ans. Br. at 84 (citing Nev. R. Civ. P. 61; *Carr-Bricken v. First Interstate Bank*, 105 Nev. 570, 573, 779 P.2d 967, 969 [1989]; *Truckee-Carson Irr. Dist. v. Wyatt*, 84 Nev. 662, 666-667, 448 P.2d 46, 50-51 [1968], *cert. denied*, 395 U.S. 910 [1968]

[burden is upon appellant to show error not harmless and that *a different result* is probable]). But despite opportunities both in his reply memorandum (Kelly Rp. Br. at 80) and at oral argument, Kelly failed – indeed did not even attempt – to articulate to the Nevada court how the case would have been decided differently under Article 1, Section 8, the takings proscription of the Nevada Constitution. And he fails here – understandably.

The Takings Clauses of the United States and Nevada Constitutions are worded quite similarly: "nor shall private property be taken for public use, without just compensation" (U.S. Const. Amdt. V); "nor shall private property be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire or great public peril. . . . " (Nev. Const. Art. 1, § 8). Kelly did not cite below, and has not cited here, a single Nevada Supreme Court decision discussing how Article 1, Section 8, of the Nevada Constitution should be read differently from its federal counterpart. Nor have we unearthed one. Indeed, the Supreme Court of Nevada historically has intermixed its discussions of the two provisions. *See, e.g., Sproul Homes v. State ex rel. Dep't Hwys.*, 96 Nev. 441, 443, 611 P.2d 620, 621-623 (1980); *Alper v. Clark County*, 93 Nev. 569, 572, 571 P.2d 810, 811-813 (1977); *Daines v. Markoff*, 92 Nev. 582, 587, 555 P.2d 490, 493 (1976); *see also County of Clark v. Alper*, 100 Nev. 382, 386, 389, 392 & 394, 685 P.2d 943, 946, 948-951 (1984); *Tacchino v. State ex rel. Dep't Hwys.*, 89 Nev. 150, 152-153 & n. 1, 508 P.2d 1212, 1213-1214 & n. 1 (1973). And even *Kelly* blended the two in his argument to the Nevada Supreme Court. *See* Kelly Op. Br. at 30.

The Nevada Supreme Court's correct disposition of Kelly's Fifth Amendment claim thus foreshadows identical treatment of a takings claim under the Nevada Constitution. Indeed, it is difficult to imagine deciding this case differently under *any* state's constitution. Moreover, as sentinel of the state constitution, the Nevada high court had every opportunity to take up Kelly's claim and rule accordingly had it felt a different result would follow. Kelly, however, gave it no reason to do so. And he gives none to this Court.

We respectfully submit, therefore, that the preemption question is not viable. It is not apropos for certiorari.

## III

## CONCLUSION

This case is too idiosyncratic to bear nationally prominent issues. Its peculiarities aside, the action was correctly decided by the Nevada Supreme Court, and the question of preemption is barren of the legal vigor requisite for extraordinary review. Kelly's petition, accordingly, should be denied.

DATED: November 23, 1993.

Respectfully submitted,

GARY A. OWEN
CROWELL, SUSICH, OWEN & TACKES
510 West Fourth Street
P.O. Box 1000
Carson City, NV 89702

*Counsel of Record for Respondent*
*Tahoe Regional Planning Agency*